IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA

PLAINTIFFS

v. **CASE NO.: 05-CV-00329 GKF –SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.

DEFENDANTS

TYSON DEFENDANTS' REPLY ON MOTION TO COMPEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

RULES

TREATISES

I. ARGUMENT

The Tyson Defendants' Motion to Compel set forth the gross inadequacies of Plaintiffs' interrogatory responses and citation to case law proving that Plaintiffs' violated their discovery obligations. Plaintiffs' response is full of unwarranted self-praise, excuses and conclusory denials of misconduct; however, it is devoid of legal authority to support their egregious violations. Plaintiffs fail to explain, let alone defend, many of the patently deficient interrogatory responses. Plaintiffs likewise fail to cite a single case in which a court determined that responses similar to Plaintiffs' responses satisfied their obligations under Rule 33. Instead, Plaintiffs argue, without any legal support or shame, that the Rule 33 obligation straightforwardly to answer interrogatories should not apply to them because they have produced more than 300 boxes of documents, some of the interrogatories are difficult to answer, and it is too early in the case to answer interrogatories. Unfortunately, this is simply the latest phase of Plaintiffs' obstructionist strategy to avoid their discovery obligations. Plaintiffs apparently hold the repugnant belief that the Federal Rules do not apply to them because they are government officials. This Court should disabuse Plaintiffs of this notion and put an immediate stop to Plaintiffs' gamesmanship.

A. Plaintiffs' Conditional Withdrawal of their Objection to the Number of Interrogatories is Improper

Plaintiffs continue their disturbing pattern of making unfounded discovery objections only to abandon those objections after the Tyson Defendants file a motion to compel. *See* Tr. 12/15/2005 Hrg. (Plaintiffs offer to produce purportedly "privileged" documents on the eve of a ruling from this Court on Cobb-Vantress' First Motion to Compel). This time the objection being withdrawn is Plaintiffs' frivolous claim that the Tyson Defendants' interrogatories,

including discreet subparts, exceeded the twenty-five per defendant limit under Local Rule 33.1. *See* Pltfs. Response, p. 23 (Dkt. No. 1036)(withdrawing the objection and agreeing substantively to respond to four interrogatories within 30 days). Plaintiffs' withdrawal of their objections to these four interrogatories only after a motion to compel was filed is improper and entitles the Tyson Defendants to an award of their fees incurred in connection with the Motion to Compel. FED. R. CIV. P. 37(a)(4)(A) ("if the disclosure or requested discovery is provided after the motion to compel was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees . . . .")

Further, Plaintiffs' belated recognition that this objection was baseless is not sincere because Plaintiffs' withdrawal of this objection is made "without waiving its right to object to the service of any further interrogatories on the ground that they exceed the number of permissible interrogatories (including subparts)." Pltfs. Response, p. 23 (Dkt. No. 1036). This sort of gamesmanship is certain to incite future discovery disputes given Plaintiffs' history of ignoring their discovery obligations. Thus, the Tyson Defendants have requested a "finding by the Court that the interrogatories [propounded by the Tyson Defendants] consist of 46 interrogatories, including discrete subparts." Motion to Compel, p. 24 (Dkt. No. 1019).

B. Plaintiffs' Interrogatory Responses Are Incomplete and Evasive

The Tyson Defendants identified thirteen (13) interrogatory responses which were incomplete and evasive as a matter of law. *See* Motion to Compel, p. 6 (Dkt. No. 1019) (*citing* Pltfs. Responses to Cobb-Vantress Interrog. Nos. 3, 4, 11; Pltfs. Responses to Tyson Poultry Interrog. Nos. 2, 4-8; and Pltfs. Responses to Tyson Foods' Interrog. Nos. 2, 3, 4, 6.) Rather

than directly address the clear inadequacies of their responses, Plaintiffs feign ignorance as to "why the Tyson Defendants believe the responses are deficient." Pltfs. Response, pp. 10 (Dkt. No. 1036).

Plaintiffs are disingenuous. Plaintiffs' responses are attached to the Motion to Compel for the Court's reference. *See* Exs. 2-5 to Motion to Compel (Dkt. No. 1019). The evasive and incomplete nature of Plaintiffs' discovery responses is evident on their face. Plaintiffs understand fully the emptiness of their interrogatory responses because they intended not to provide meaningful disclosures. Plaintiffs' refusal to provide substantive information is, in fact, the *modus operandi* that has plagued this case.

Five interrogatory responses were discussed at length in the Motion to Compel. *See* Tyson Defs. Motion to Compel, pp. 6-7 (Dkt. No. 1019)(explaining Plaintiffs' failure substantively to respond to Tyson Poultry Interrogatory Nos. 4-8, which requested information such as the date and location of the statutory violations alleged in Plaintiffs' complaint and the identification of farmers under contract with the Tyson Defendants purportedly involved in such violations). Amazingly, Plaintiffs do not dispute that their responses to these five interrogatories provide none of the information requested. Notwithstanding that Plaintiffs filed a blunderbuss complaint alleging numerous statutory and common law violations involving more than 1,000,000 acres of land, Plaintiffs argue the interrogatories were overly burdensome and oppressive because they ask for "all" information or "every fact" and that it is "literally impossible to write a narrative response to the sort of detailed interrogatories posed by the Tyson Defendants." Pltfs. Response, pp. 11, 12 (Dkt. No. 1036). Thus, Plaintiffs eschew their discovery obligations and say they elected simply to "provide a concise narrative of circumstances which give rise to a violation of the particular statutes." *Id.* at p. 10. The Tyson

Defendants asked for facts about specific alleged violations. The Federal Rules hold that the Tyson Defendants are entitled to such proof. For example, Plaintiffs allege that farmers under contract with the Tyson Defendants have violated the Confined Animal Feeding Operations Act, the Oklahoma Registered Poultry Operations Act, the Agriculture Code, the Environmental Quality Act and the Administrative Code. *See* First Amended Complaint ("FAC") ¶¶ 128-39. The Rules mandate that Plaintiffs produce all evidence that supports those claims. If they have no such evidence, Plaintiffs must say so, under oath in a verified interrogatory response.

Plaintiffs' argument that the inclusion of requests for "all" information somehow relieves them of their obligation substantively to respond is unfounded. While it is improper simply to send an interrogatory that asks for each and every fact supporting every allegation made in a case, *see Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 405 (D. Kan. 1998), that is not what the five interrogatories at issue seek. Each interrogatory targets a specific claim made by the Plaintiffs. Each interrogatory is limited to facts demonstrating violations of specific statutory provisions by a specific group of individuals (*i.e.*, growers under contract with the Tyson Defendants). Interrogatories such as these are proper and are routinely upheld by the Courts. "Interrogatories which do not encompass every allegation, or a significant number of allegations of the Complaint, reasonably place upon the answering party the duty to answer them by setting forth the material or principal facts." *Williams v. Sprint/United Management Co.*, 235 F.R.D. 494, 497 (D. Kan. 2006); *see also, IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D. Kan. 1998) ("Nor do the interrogatories here simply sweep the entire complaint to include matters admitted in a responsive pleading. The Court finds, consequently, that they have reasonably placed upon plaintiff the duty to answer them by setting forth the material or principal facts, including any necessary application of law to fact.") Plaintiffs' responses to

these five interrogatories include no facts, much less the "material or principal facts" which they were required to disclose.

As for the eight (8) remaining interrogatory responses identified in the Motion to Compel as incomplete and evasive, the Tyson Defendants offer the following chart to illustrate the obvious instances of evasiveness or incompleteness:

Interrogatory	Deficiency
Cobb-Vantress Interrog. No. 3	Plaintiffs were asked to describe all remedial measures they contend are necessary for the IRW and to identify the geographic scope and estimated costs of each remedial measure. Plaintiffs' response includes no information on costs or geographic scope of remedial measures and only generic descriptions of proposed measures such as "limit land application of poultry waste."
Cobb-Vantress Interrog. No. 4	Plaintiffs were asked to identify any natural resources which they claim were destroyed and need to be replaced, to state the factual basis for those claims, and to provide an estimate of the cost of replacement. Plaintiffs' response repeats the mantra of the complaint that all natural resources have been injured, but provides no factual basis to determine which ones have been destroyed and no estimates of the cost of replacement.
Cobb-Vantress Interrog. No. 11	Plaintiffs were asked to identify instances in which they afforded public comment on their proposed remediation of the IRW in accordance with CERCLA's National Contingency Plan. Plaintiffs respond only by arguing they are not required to provide opportunity for public comment. No factual information is supplied.
Tyson Poultry Interrog. No. 2	Plaintiffs were asked to describe any actions taken by the State to control or manage the poultry-related "discharges" alleged in their complaint. Plaintiffs provide no factual information in response to this interrogatory.
Tyson Foods Interrog. No. 2	Plaintiffs were asked to detail by nature and amount each category of damages sought in this case and to describe the calculations used to arrive at their damage estimates. Plaintiffs' response contains absolutely no responsive information.
Tyson Foods Interrog. No. 3	Plaintiffs were asked to identify any real property owned by the State in the IRW and to provide the dates of ownership and a description of activities occurring on each parcel of real property. Plaintiffs refuse to identify properties owned by the State and proclaim only that properties owned by the State in the IRW are used in the "typical" manner of universities, State agency offices and state parks.

Interrogatory	Deficiency
Tyson Foods Interrog. No. 4	Plaintiffs were asked to identify by composition and volume any chemicals, fertilizers or waste materials stored, used or disposed of on properties owned by the State in the IRW. Plaintiffs provide no factual information in response to this interrogatory.
Tyson Foods Interrog. No. 6	Plaintiffs were asked to identify instances in which the State has permitted, licensed or authorized the release into the IRW of chemicals, fertilizers or waste materials containing the substances alleged in the complaint in this case. The State's response includes a non-responsive and erroneous legal argument about whether operating under a permit insulates someone from liability but is devoid of any responsive factual information.

"The Federal Rules contemplate candor in answering interrogatories" and evasive or incomplete answers should not be tolerated. *Herdlein Techs v. Century Contractors*, 147 F.R.D. 103, 108 (W.D.N.C. 1993). Plaintiffs flagrantly violate this rule.

C. The Tyson Defendants are Not Complaining About the Quantity of Documents Produced by the State

Unable to defend their responses to the interrogatories, Plaintiffs try to transform this dispute into something it is not. Plaintiffs claim that the "the Tyson Defendants assert in their Motion to Compel that the State has not produced any responsive documents." Pltfs. Response, p. 4 (Dkt. No. 1036). Then, Plaintiffs claim that the Tyson Defendants make the "unfounded and baseless assertion that the State has not provided any responsive information." Pltfs. Response, p. 4 (Dkt. No. 1036). Plaintiffs devote seven pages of their Response to extolling their "rolling production" of documents and the defendants' inspection of approximately 300 boxes of agency records containing an estimated one million pages of documents and the defendants' inspection of those documents. Pltfs. Response, pp. 4-10 (Dkt. No. 1036). As is shown below, even Plaintiffs' so-called "rolling production" was orchestrated not to provide meaningful discovery to defendants. In all events, if the dispute arose from a failure by

Plaintiffs to produce documents under Rule 34 requests, perhaps Plaintiffs' boastful recitation of their "good faith" efforts to produce documents might be relevant. However, the Motion to Compel addresses Plaintiffs' patently defectively responses to interrogatories under Rule 33.[1]

An interrogatory demands an answer, verified under oath by a party. The only instance in which a party may avoid providing a straightforward answer to an interrogatory by referring to documents is when that party complies with the requirements of Rule 33(d). The Tyson Defendants are not obligated to cull through a million pages of agency records to try to find documents that Plaintiffs may later claim as support for the allegations targeted by the interrogatories. As explained in the Motion to Compel, Plaintiffs' rolling production of agency records falls miserably short of the requirements of Rule 33(d). Moreover, the depositions of records custodians from state agencies irrefutably prove that Plaintiffs' reliance upon Rule 33(d) is wholly improper and, in fact, is evidence of Plaintiffs' concerted efforts not to comply with their discovery obligations.

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[1] Plaintiffs also challenge the assertion by Tyson's counsel, in response to a question from the Magistrate Judge, that Plaintiffs have "never given [] a specific location in which they found heightened phosphorus, arsenic, bacteria or hormones." Pltfs. Response, p. 4 (Dkt. No. 1036)(*quoting* Tr. 12/15/2006 Hrg., 104:2-6). Plaintiffs claim to refute this assertion by pointing to their initial disclosures where they referred defendants to "USGS data on the internet . . . [which] shows phosphorus readings for the Illinois River at the USGS Tahlequah monitoring station." Pltfs. Response, p. 5 (Dkt. No. 1036). They claim the USGS data set also includes "data at various locations on the Illinois River for many constituents and bacteria." *Id.* Plaintiffs are disingenuous and evasive. The Magistrate Judge's question was not whether there are "phosphorus readings" or data showing that bacteria has been detected in the Illinois River. Phosphates and bacteria are part of the natural environment and, therefore, are detectable, at some level, in virtually every stretch of water in the United States. The question posed by the Magistrate Judge was whether the Plaintiffs have identified "heightened" levels of the substances alleged in their complaint. *See* Tr. 12/15/2006 Hrg., 104:3. After more than 18 months of litigation, Plaintiffs have not identified a single specific location where they have detected elevated or heightened levels of phosphorus, arsenic, hormones or bacteria, much less zinc and copper which are also alleged in the complaint. Perhaps they do not want to take a position on what constitutes a heightened or elevated level or perhaps they have found no heightened or elevated levels of the substances alleged in their complaint. Only the Plaintiffs can answer those questions. Thus far, they refused to do so, notwithstanding their clear obligation to do so.

D. Plaintiffs' Indices of State Agency Documents and the Records Custodian Depositions Do Not Meet the Requirements of Rule 33(d)

Plaintiffs' response regarding their misuse of the Rule 33(d) option is as empty as their interrogatory responses. They fail to cite any case in which another court has approved of Rule 33(d) invocations such as those made by Plaintiffs in this case. Plaintiffs either do not understand their obligations under Rule 33(d) or they are simply hoping this Court will excuse or dilute those obligations because this is a complex case and they are government officials.[2] Plaintiffs do not address the cases holding that reliance on Rule 33(d) is improper in response to contention interrogatories because one party cannot differentiate in a mass of records the documents or evidence which its adversary believes supports its claims from those documents which are viewed by the opposing party as nonsupportive. *See, e.g., Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 436, 439 (D. Kan. 1987) (the court "will not require defendants to fathom what plaintiff-intervenor may elect to contend as claims from the thousands of documents which have been produced"); *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Caton*, 136 F.R.D. 682, 687 (D. Kan. 1991) ("Plaintiff's argument that defendant can discern from the general mass, exactly what plaintiff claims defendant did or did not do, or both, as well as plaintiff can, is almost absurd. Only plaintiff and its lawyers know what evidence, as opposed to all the information it has discovered, it intends to offer at trial and the relationship of that evidence to its theories of recovery and claims against [defendant].")

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[2] Plaintiffs' closing remark in the section of their response "addressing" the Rule 33(d) problems that "the State is working hard to produce information that supports its case" is of little consolation to the Tyson Defendants. Pltfs. Response, p. 16 (Dkt. No. 1036). After a year and a half of litigation and an even longer period of public accusations by Plaintiffs, the Tyson Defendants reasonably expected that Plaintiffs would be prepared by now to answer questions about the nature and extent of their claims and the evidence, if any, supporting those claims.

Plaintiffs defend their broad and wholly improper reliance upon Rule 33(d) by pointing out that some interrogatories asked for the identification of documents. This argument misses the point. The Tyson Defendants requested the Plaintiffs identify specific reports, studies or data that Plaintiffs believe support certain allegations. In response, Plaintiffs generically refer to more than hundreds of boxes of documents from various state agencies without specifically identifying a single report or study or any data on which Plaintiffs rely to support their allegations. *See, e.g.,* Exs. 15-18 to Pltfs. Response (Dkt No. 1036) (referring the Tyson Defendants to 136 boxes of documents from three different agencies for the answer to Tyson Chicken Interrogatory No. 5, which asks Plaintiffs to identify any reports or modeling work that assesses the relative contributions of any or all of the defendants named in this case to any injury, loss, damage or impairment of the natural resources within the IRW.) Plaintiffs' references to 136 boxes of documents violates Rule 33(d)'s requirements. *See In re Bilzerian*, 190 B.R. 964, 965 (Bankr. M.D. Fla. 1995) ("references to documents furnished in more than twenty-eight boxes . . . clearly were not sufficiently identified to comply with the requirement of Fed. R. Civ. P. 33(d)").

Plaintiffs' disregard for their discovery obligations is also illuminated by their claim the Tyson Defendants' merely raise an "immaterial semantic distinction" by highlighting the "non-committal" nature of Plaintiffs' Rule 33(d) designations. Pltfs. Response, p. 18 (Dkt. No. 1036). The case law on Rule 33(d) is uniform in its recognition of the very material distinction between the statement that an answer to an interrogatory will be found in specific documents being produced and equivocal statements such as those made by the Plaintiffs. *See, e.g., Sable v. Mead Johnson & Co.,* 110 F.R.D. 553, 555 (D. Mass. 1986) ("the party invoking the option provided by Rule 33[d] may not do so if all which can be said is that the answer 'might' be found in the

records; the party invoking the option must be able to represent that the party will be able to secure the information which is sought by the interrogatory in the records.")

It is Plaintiffs that are engaged in a game of semantics, not the Tyson Defendants. And, Plaintiffs' game is a direct violation of their discovery obligations. The "non-committal" language that Plaintiffs' used in their interrogatory responses and in connection with the indices produced months later is not accidental. Mr. Tolbert, who verified Plaintiffs' interrogatory responses, has not affirmed that the answers to those interrogatories will be found in the boxes of agency records listed on Plaintiffs' indices. Incredibly, the deposition of the records custodian for the Oklahoma Conservation Commission reveals that Mr. Tolbert did not even bother to review the agency records which his lawyers now claim satisfy his reliance on Rule 33(d). *See* Tr. 1/9/2007 Depo. of Oklahoma Conservation Commission Records Custodian Ben Pollard 116:21 – 117:12 attached hereto as Exhibit A. Mr. Tolbert's obvious disregard for his obligations in responding to discovery is contemptous.

Moreover, the Tyson Defendants have learned that the agency personnel responsible for assembling the boxes of documents that Plaintiffs now claim contain the answers to the Tyson Defendants' interrogatories made no effort to search for materials specifically responsive to those interrogatories.

> Q [Counsel for Tyson]: Okay. My clients have participated in trying to seek discovery from the state in this case and they've issued approximately 38 interrogatories and three request for production. Have you seen any document that says Tyson Foods' interrogatories on it or Tyson Poultry interrogatories on it or Tyson Chicken interrogatories on it or Cobb-Vantress interrogatories on it?
>
> A [OCC Records Custodian]: Not to my knowledge.
>
> Q Okay. Have you had any discussions with your boss or anyone else that you work with particularly related to searching for this large amount of

documents that are in this room where Tyson's request for information in this case has come up?

A Not to my knowledge. We have been aware that there are other requests for information, but it was our understanding that by pulling the information that was inclusive of everything in the Illinois River Watershed and everything related to the Illinois River Watershed and our Beaty Creek project, that we were fulfilling those requirements.

Q Okay. But you haven't actually laid your eyes on - -

A No.

Q - - requests from my clients?

A No.

Q Okay. And when searching for documents within this agency, you don't know exactly what my client has asked for because you haven't seen it?

A No.

Q That's correct?

A That's correct.

Q Okay. Do you know if documents that are alleged to be responsive to my clients' discovery requests are being produced today?

A I don't know.

See Tr. 1/9/2007 Depo. of Oklahoma Conservation Commission Records Custodian Shannon Phillips 114:23-116:12 attached hereto as Exhibit B. Clearly, Plaintiffs knew that in most instances the answers to the Tyson Defendants' interrogatories are not found in the boxes listed on the indices produced at State records custodian depositions taken months after Mr. Tolbert verified Plaintiffs' interrogatory responses. Incredibly, according to the Oklahoma Conversation Commission, no one representing Plaintiffs even advised that agency what documents were being sought by the Defendants. To the contrary, this agency testified that Plaintiffs instructed it only to produce all documents relating to the IRW. Now, Plaintiffs make the factually frivolous

argument that they properly rely on Rule 33(d) in *lieu* of responding to the interrogatories. This raw, brute and wholly intentional violation of the Rules should not be condoned by the Court.

Even in their response to the Motion to Compel, Plaintiffs fail to represent that the support for their claims and the answers to the Tyson Defendants' interrogatories can actually be found in the boxes referenced in their touted indices. Instead, they offer only double-speak such as "[t]he answer to at least some part (sic) each of the interrogatories whose response the Tyson Defendants' challenge may be found in the records and documents of the State and its subordinate agencies." Pltfs. Response, p. 13 (Dkt. No. 1036). Plaintiffs' attempt in their indices to "correlate" certain boxes of documents with certain interrogatories is smoke and mirrors. The answers to the Tyson Defendants' interrogatories are not found in the referenced boxes. If the answers were in those boxes, Plaintiffs would have identified them in response to the Motion to Compel. They did not.

Even if Rule 33(d) designations in response to the sort of interrogatories served by the Tyson Defendants were appropriate (and they were not), and even if Plaintiffs' non-committal statements satisfied Rule 33(d) (and they do not), Plaintiffs' designations are still faulty due to lack of specificity. Rule 33(d) requires a party to "specify the records from which the answer may be derived or ascertained." FED. R. CIV. P. 33(d). Plaintiffs acknowledge that Rule 33(d) requires "sufficient detail to permit interrogating party to identify readily individual documents from which the answer may be ascertained." Pltfs. Response, p. 15 (*citing American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 109 F.R.D. 263 (E.D.N.C. 1985)). Rule 33(d), however, requires identification of individual documents, not boxes of documents. *See In re Bilzerian*, 190 B.R. 964, 965 (Bankr. M.D. Fla. 1995) ("references to documents furnished in

more than twenty-eight boxes without specifying the particular documents . . . clearly were not sufficiently identified to comply with the requirement of Fed. R. Civ. P. 33(d)").

Plaintiffs' glorious "indices" which they describe as a "roadmap" to the production of documents fall abysmally short of the specificity required by Rule 33(d). *See Sabel v. Mead Johnson & Co.*, 110 F.R.D. 553, 556 (D. Mass. 1986) (merely providing an index of 154,000 pages of documents does not satisfy Rule 33(d)'s specificity requirements.)

Five of the interrogatories for which Plaintiffs invoked Rule 33(d) are completely absent from Plaintiffs' indices. *See* Exs. 15-18 to Pltfs. Response (Dkt. No. 1036) (containing no references to Cobb-Vantress Interrogatory Nos. 5, 8, Tyson Chicken Interrogatory No. 2 or Tyson Foods Interrogatory Nos. 3, 4.)[3] As for the rest of the interrogatories, a close examination of the indices reveals that Plaintiffs are generally referring the Tyson Defendants to dozens of boxes of materials for documents which may or may not answer each interrogatory. The answer to Cobb-Vantress Interrogatory No. 14 is purportedly spread throughout sixty-two (62) boxes of documents. *See* Exs. 15-18 to Pltfs. Response (Dkt. No. 1036). Plaintiffs' indices reference seventy-six (76) boxes of documents in response to Tyson Poultry Interrogatory No. 1. *Id.* Plaintiffs' indices reference one hundred thirty-six (136) boxes of documents in response to Tyson Poultry Interrogatory No. 3 and Tyson Chicken Interrogatory Nos. 5, 6 and 8. *Id.* Plaintiffs' indices reference thirty-two (32) and thirty-one (31) boxes of documents in response to Tyson Chicken Interrogatory No. 10 and Tyson Foods Interrogatory No. 5, respectively. *Id.* Plaintiffs' indices reference seventy-four (74) boxes of documents in response to Tyson Foods

[3] Apparently, Plaintiffs were exaggerating when they stated that these indices "link each interrogatory to the appropriate location in the production in which to find responsive documents", Pltfs. Response, p. 16 (Dkt. No. 1036), and when they claimed "the answer to at least some part (sic) each of the interrogatories whose response the Tyson Defendants challenge may be found in the records and documents of the State and its subordinate agencies." *Id.* at 13.

Interrogatory No. 6 and sixty-three (63) boxes of documents in response to Tyson Foods Interrogatory No. 11. Plaintiffs' references to the hundreds of boxes of documents produced at the records custodian depositions comply with Rule 33(d) as a matter of law.

Plaintiffs have only two choices under Rule 33 – either substantively respond to the interrogatories or identify specific documents or records which actually contain the answers to the interrogatories. Plaintiffs have done neither. Accordingly, the Court must grant the Tyson Defendants' Motion to Compel.

E. Deferring or Delaying Plaintiffs' Obligation to Respond to "Contention Interrogatories" is not Warranted

Plaintiffs make a desperate plea that this Court temporarily excuse them from the inconvenience of having to respond to interrogatories that ask them to define their claims and provide facts and evidence supporting those claims. Plaintiffs warn that "the Court needs to be particularly careful about the early use of contention interrogatories of the sort served by the Tyson Defendants" (Pltfs. Response, p. 12), and then request the Court to enter an order deferring until "discovery is completed or until a pre-trial conference" their obligation substantively to respond to such interrogatories. In addition to the obvious absurdity of Plaintiffs' claim that we are still "early" into this case, Plaintiffs' request to delay their discovery obligations until some indefinite time in the future is shameful. It also is contrary to the law.

Contention interrogatories are entirely proper discovery devices. "The purpose of such interrogatories is to narrow and define issues for trial and to enable the propounding party to determine the proof required to rebut the respondent's position." *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 447 (D. Kan. 2000) (*citing Towner v. Med. James, Inc.*, 1995 WL 477700 (D. Kan. Aug. 9, 1995)). "[C]ontention interrogatories may in certain cases be the most reliable and cost-effective discovery device." *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*,

175 F.R.D. 646, 652 (C.D. Cal. 1997) (*citing McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 134 F.R.D. 275, 287 (N.D. Cal. 1991)). While a court has the discretion under Rule 33(c) to defer responses to such interrogatories until later in the case, most courts require immediate responses based on information then possessed because the responding party has the right and duty to supplement its response pursuant to Rule 26(e). *See, e.g., Cable & Computer Tech.*, 175 F.R.D. at 651 ("if the concern in answering a contention interrogatory before discovery has been completed, or even substantially done, is that the answer to the interrogatory may limit the party's proof at trial, that concern is misplaced in that, among other things, the trial court may permit the withdrawal or amendment of an answer to an interrogatory") (*citing* Wright, Miller & Marcus, *Federal Practice and Procedure: Civil* § 2181 at 344 (2d ed. 1994)); *In re One Bancorp Securities Litig.*, 134 F.R.D. 4, 7-8 (D. Maine 1991)("the Court finds no sufficient justification to grant Plaintiffs the delay they seek . . . Consistent with Rule 11 of the Federal Rules of Civil Procedure, Plaintiffs must have some factual basis for the allegations of their complaint. Plaintiffs must answer Ernst & Young's interrogatories with such information as they now possess; furthermore, Plaintiffs should supplement their responses to reflect new information developed as their own discovery progresses.")

Here, there is no reason to defer Plaintiffs' obligation to answer the Tyson Defendants' interrogatories. Those interrogatories seek to uncover the nature and basis of Plaintiffs' claims. As counsel for the Tyson Defendants explained at the last hearing:

> The State has severely over-pled this case. . . . Defendants are still seeking to discover what this case is about. . . . . [T]he Plaintiffs have filed a complaint and we've sent some discovery and we have received all manner of objections and qualifications but we don't know whether or not this case is about phosphorus, whether this case is about arsenic, whether this case is about copper, whether this case is about hormones. . . . [W]e don't know whether this is a case alleging, in a genuine sense, contamination of groundwater, or contamination of

> streams, or contamination of rivers. . . . [W]e're 18 months into this case and the defendants don't know what is contaminated or where is the contamination.

Tr. 12/15/2005 Hrg. 70-71. Before the Tyson Defendants can gather proof to rebut Plaintiffs' claims, Plaintiffs must articulate the theory of their case and disclose the factual basis, if any, for their claims. Plaintiffs' refusal to define their claims and to identify evidence supporting those claims in response to the interrogatories is inexcusable and highly prejudicial to the Tyson Defendants.

F. Neither the Work-Product Doctrine Nor Rule 26(b)(4)(B) Relieve Plaintiffs from Substantively Responding to the Interrogatories

Plaintiffs excuse their defective interrogatory responses with their patented and well-worn assertion that they do not have to respond to any question or produce any document which might reveal the theory of their case or some day be the subject of an expert report. Plaintiffs' continual and regular disregard of their discovery obligations and abuse of the work product doctrine and other privileges proves that Plaintiffs believe they are bound by no rules, legal or ethical. This Court should put a stop now to Plaintiffs' systematic abuse of the discovery rules and process.

Plaintiffs claim the "consulting expert" protections of Rule 26(b)(4)(B) justified their refusal to disclose any information relating to their claimed damages. This is patently frivolous. The information sought by Tyson Foods Interrogatory No. 2 and Cobb-Vantress Interrogatory No. 4 is the exact information that Rule 26(a)(1)(C) expressly requires be produced. Plaintiffs' only response is their inane statement that "this is not a simple automobile accident case. The state cannot take its polluted Scenic River to a body shop for an estimate of damages." Pltfs. Response, p. 20 (Dkt. No. 1036). Such wanton hubris is the source of Plaintiffs' exceedingly abusive behavior with respect to discovery that has permeated this case. Defendants are being

severely prejudiced by Plaintiffs' gross misconduct and serial violations of the Rules. The Tyson Defendants respectfully request that this Court end Plaintiffs' abuse of the discovery process. Initial disclosure requirements of Rule 26(a) are not limited to simple automobile accident cases. They apply in all cases; even in cases brought by government officials who wrongfully assume they are above the Rules. The fact that this suit is complex and Plaintiffs are purportedly still consulting with their damage experts has not stopped Plaintiff Edmondson from making public comments about this very subject. *See Oklahoma-Arkansas Dispute Exposes National Problem*, StoriesThatMatter.org. (Aug. 29, 2006) (reporting comment by Edmondson that "a victory for his side will raise the cost of Arkansas poultry by 10 cents a bird in a market where fractions of a penny mean precious market share"), attached hereto as Exhibit C. If Plaintiffs truly have not yet decided how to measure their damages or tried to calculate those damages, then Plaintiff Edmondson should refrain from making public representations about the magnitude of such damages.

In any event, the fact that Plaintiffs have not finalized expert reports on damages does not relieve them of their obligation to respond to the interrogatories at issue. In *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, *supra*, the court rejected the precise argument being advanced by these Plaintiffs. The defendant in that case served an interrogatory which sought "each component of damages you [plaintiff] claim you have suffered as a result of the acts or omissions you allege in the Complaint, including, but not limited, to stating the dollar amount of each and how much was calculated." 175 F.R.D. at 651. The plaintiff in that case objected to this and similar interrogatories on the grounds that they were contention interrogatories and that it was too early in the case for plaintiffs to be expected to answer such questions. The court properly rejected those arguments holding that "although it is too early for plaintiff to provide

expert opinions on the subject of damages, plaintiff may, at this time, answer interrogatory no. 1 based on the information it has to date. Of course, plaintiff may later amend its answer with leave of Court or supplement it, as it has an obligation to do under Fed. R. Civ. P. 26(e)." *Id.* at 652. Like the defendant in *Cable & Computer Tech.,* the Tyson Defendants are entitled to answers to their interrogatories based on the information presently possessed by Plaintiffs.

Plaintiffs disingenuously try to narrow the Tyson Defendants' complaints about their unfounded privilege claims to the two damage interrogatories discussed above by only addressing the "two particularized challenges to the State's invocation of the work product and expert opinions." Pltfs. Response, p. 20 (Dkt. No. 1036). Of course, Plaintiffs' privilege claims were not limited to Tyson Foods Interrogatory No. 2 and Cobb-Vantress Interrogatory No. 4. Plaintiffs' stock-in-trade abuse of frivolous privilege claims has never been so limited since they commenced this lawsuit. To the contrary, as pointed out in the Motion to Compel, "Plaintiffs objected to all 46 interrogatories" on these same grounds. Tyson Defs. Mot. to Compel, p. 17 (Dkt. No. 1019). As the party objecting to the discovery, it is Plaintiffs' obligation to explain and support those objections. *Cable & Computer Tech.,* 175 F.R.D. at 650 (*citing Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993)); *Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 135 F.R.D. 101, 104 (D.N.J. 1990)). "The party asserting work product privilege has the burden of showing the applicability of the doctrine." *In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 (10th Cir. 1998) (*citing Barclayamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir. 1984)). Blanket assertions of privilege are insufficient to meet this burden. *See FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1276 (10th Cir. 1998) (*citing Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985)). Plaintiffs offer no

explanation or defense of their "privilege" objections to the other 44 interrogatories at issue in the Motion to Compel. Consequently, those objections must be overruled.

Plaintiffs' privilege objections also are entirely meritless. Plaintiffs correctly characterize most of the interrogatories as "contention interrogatories." Pltfs. Response, pp. 12, 16 (Dkt. No. 1036). "The work product doctrine cannot be used as a bar to answering contention interrogatories." Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. 441, 451 (July, 1993). Rule 33(c) expressly provides that "[a]n interrogatory otherwise improper is not necessarily objectionable because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." FED. R. CIV. P. 33(c). Simply put, there is no conflict between the work-product doctrine and contention interrogatories.

> [C]ourts do not favorably consider arguments that contention interrogatories are objectionable based on work product privilege. Courts have rejected on several grounds the argument that contention interrogatories violate the work product doctrine. First, in some cases, when answering contention interrogatories, the party is only giving the factual specifics which it contends supports a claim or defense, which does not impinge on an attorney's impressions or analysis as to how the attorney will apply the law to those facts. Second, the discovery rules regularly allow litigants to gain information revealing a party's legal theory, because the information sought will appear during trial, if not before. This information is expected to be revealed, and in fact, the attorney should emphatically raise and advance the theory of the case when answering a contention interrogatory.

Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. at 451 (*citing SEC v. Morelli*, 143 F.R.D. 42, 48 (S.D.N.Y. 1992)); *King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 5 n. 3 (D.D.C. 1987); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016 (1st Cir. 1998)). As a matter of law, Plaintiffs' work product objections to the Tyson Defendants' interrogatories are improper. Plaintiffs should be ordered to answer each of the interrogatories with information presently possessed by Plaintiffs.

G. Plaintiffs' Representations to this Court about the *West* action are Misleading

Plaintiffs clearly take great offense that the Tyson Defendants advised the Court of reports that the Attorney General's office asked Marie West, former Assistant Attorney General and counsel to the Oklahoma Scenic Rivers Commission, to destroy documents as part of settlement negotiations in a lawsuit filed by Ms. West against the Mr. Edmondson and others. Plaintiffs claim that the Tyson Defendants have "jump[ed] to unfounded conclusions" and are engaged in an "unremitting, yet wholly unwarranted, effort to cast the State in a poor light." Pltfs. Response, p. 3, fn. 2 (Dkt. No. 1036).

Plaintiffs' indignation is ironic (and phony) given their well-documented attempts in the present case to conceal information and their longstanding refusal to comply with the rules that govern most normal litigants. Plaintiffs' arrogant overreaction to the Marie West report should not distract the Court from the real issues. In their "responses" to the Tyson Defendants' interrogatories and the Motion to Compel Plaintiffs repeatedly ask this Court and the Tyson Defendants simply to trust them when they say the answers to every interrogatory can be found somewhere in the more than 300 boxes of documents being produced by numerous state agencies in connection with this case. The Tyson Defendants have no control over what makes its way into those boxes and what does not. The State has proven it will resort to any tactic in order to withhold pertinent documents and information. That history, coupled with Ms. West's allegations that she was asked to destroy documents prevents the Tyson Defendants or this Court from blindly trusting Plaintiffs' claims that the answers are "in the documents." The Tyson Defendants are entitled to direct answers to their interrogatories and not empty assurances about the contents of the other state agencies' document productions.

Unfortunately, the Tyson Defendants must now go further in discussing the Marie West matter because Plaintiffs have made several misleading statements in their effort to spin this situation in a light less devious than the logical conclusion to be drawn. First, Plaintiffs suggest that the document destruction claims by Ms. West "were found without merit and dismissed by the United States District Judge Ralph G. Thompson." Pltfs. Response, p. 3, fn. 2 (Dkt. No. 1036). Plaintiffs are deceiving the Court. Ms. West's claims about the destruction of documents arise out of settlement negotiations that occurred between her and the Attorney General's office after the lawsuit was filed. The claims that were dismissed by United States District Judge Ralph G. Thompson were sexual harassment claims arising from Ms. West's pre-lawsuit employment with the Attorney General's office. *See West v. Burch,* CIV-03-1019-T, W.D. Okla., Apr. 11, 2007 Order (Dkt. No. 239), Apr. 4, 2007 Order (Dkt. No. 238), May 16, 2006 (Dkt. No. 245). Further, her harassment claims were not found by Judge Thompson to be without merit. Rather, the orders referenced by Plaintiffs merely grant summary judgment to Mr. Edmondson and the State of Oklahoma because Judge Thompson determined that these two defendants were not aware of, and thus could not be vicariously liable for, the alleged wrongdoing by Ms. West's supervisor, Kelly Hunter Burch. *See West v. Burch,* CIV-03-1019-T, W.D. Okla., Apr. 11, 2006 Order (Dkt. No. 239), Apr. 4, 2006 Order (Dkt. No. 238). Judge Thompson did not rule on the merits of Ms. West's claims of harassment and intimidation against Assistant Attorney General Kelly Hunter Burch, the State attorney primarily responsible for the present case. Ms. West's claims against Ms. Burch were not dismissed or determined to be unfounded and the "administrative closure" of the case came only after Ms. West and Ms. Burch reached a "settlement and compromise." *See West v. Burch,* CIV-03-1019-T, W.D. Okla., May 16, 2006 Order (Dkt. No. 245).

Second, Plaintiffs have severely misled this Court by claiming that the Attorney General Office's request for the destruction of documents as a condition of settlement with Ms. West was nothing more than a boilerplate provision in a standard form proposed release. Pltfs. Response, p. 3, fn. 2 (Dkt. No. 1036). Plaintiffs' improperly assume that the Tyson Defendants "failed to investigate the facts before raising the suggestion that the State has engaged in efforts at spoliation." Pltfs. Response, p. 3, fn. 2 (Dkt. No. 1036). The Tyson Defendants are prepared to disclose to the Court *in camera* the extent of its investigation. The Tyson Defendants' have been informed that the Attorney General's Office specifically negotiated with Ms. West with the goal of securing an agreement by her to destroy documents and that the State's settlement offer was $35,000 if Ms. West refused to destroy documents but $50,000 if she would agree to destroy documents. "Boilerplate" provisions are not the subject of specific negotiations or offers of additional financial consideration. Too, even if a provision requiring the destruction of documents for money were "boilerplate", such a provision would not be improper where, as here, it would constitute a contract to do something illegal.

II. CONCLUSION

Plaintiffs' objections to the Tyson Defendants' interrogatories are unfounded and their responses are inadequate. Accordingly, the Tyson Defendants respectfully request entry of an order pursuant to Rule 37(a)(2)(B) striking Plaintiffs' Rule 33(d) responses, overruling Plaintiffs' discrete subpart, attorney work-product and consulting expert objections, and ordering Plaintiffs directly and completely to answer each of the interrogatories with the information Plaintiffs' presently possess. Moreover, the Tyson Defendants are entitled to an award of their reasonable expenses and attorneys' fees incurred in the making of the Motion to Compel pursuant to Rule 37(a)(4)(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 12th day of February 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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